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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

VERMONT & 43rd MEDICAL CLINIC, INC., Plaintiff and Appellant, v. MOLINA MEDICAL CENTERS, INC., Defendant and Respondent.	B185517 (Los Angeles County Super. Ct. No. BC215293)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ralph W. Dau, Judge. Affirmed.

Robert G. Weitzman, William A. Brown, Jr., for Plaintiff and Appellant.

Bingham McCutchen, Robert B. Ericson, Heather A. Kabele for Defendant and Respondent.

The parties arbitrated a dispute arising from their "Primary Care Provider Service Agreement," and appellant was awarded a small sum of money. Dissatisfied with the amount of the award, appellant launched a personal attack on the arbitrator, making unfounded claims of corruption, incompetence, bias, undue influence, and misconduct. The trial court wisely rejected appellant's claims, and entered judgment on the arbitration award. We affirm.

FACTS

This is the second appeal in this case. In the prior appeal, we addressed the issue of arbitrability. (*Vermont & 43rd Medical Clinic, Inc. v. Molina Medical Centers, Inc.* (Feb. 26, 2001, B139060 [nonpub. opn.].) As stated in our opinion, respondent Molina Medical Centers, Inc. (Molina), operates a prepaid health care service plan. Molina entered a service agreement with appellant Vermont & 43rd Medical Clinic, Inc. (Vermont), a health care provider. The parties' agreement is terminable without cause and contains an arbitration clause. In 1997, Molina terminated the agreement. Vermont sued Molina for breach of contract, unfair competition, interference with business relations, and unfair trade practices. When Molina sought arbitration, the trial court ruled that only the contract claim was arbitrable. We determined that both the tort and the contract claims are subject to arbitration, and directed the trial court to refer the entire matter to an arbitrator.

In November 2001, Vermont made a demand for arbitration with the American Arbitration Association (AAA).[1] The AAA appointed an arbitrator, who held numerous preliminary hearings to resolve discovery issues. Vermont refused to pay its share of the AAA fees and demanded the arbitrator's resignation due to alleged bias in his rulings. The AAA proposed a new arbitrator, despite letters from Vermont's counsel questioning the impartiality of the AAA and stating that "we would not approve any of the arbitrators

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[1] The AAA is the arbitral body specified in the parties' agreement.

anyway." Eventually, the parties jointly selected retired Judge Jerry K. Fields as the arbitrator. The trial court formalized Fields's appointment in a September 2003 order.

The arbitration hearing began in July 2004. By stipulation, the matter was bifurcated into liability and damages phases. In a 14-page discussion of liability, the arbitrator ruled against Vermont on its tort claims. Making a detailed legal and evidentiary analysis, the arbitrator determined that Molina breached the parties' service agreement by reassigning medical plan members to another doctor before the termination date of the parties' agreement: Molina "had no right to assign any members from Vermont to another doctor until the expiration of the contract." The arbitrator rejected Molina's eight affirmative defenses.

In October 2004, the arbitrator and the parties' attorneys agreed that the hearing on the damages phase of the arbitration would be held on February 16, 2005. This date was reconfirmed multiple times. On February 3, 2005, Robert Weitzman, an attorney for Vermont, sent a facsimile: he verified the February 16 hearing date but asked that the matter be continued or taken off calendar. Weitzman wanted to conduct further discovery, though the parties and the arbitrator had previously agreed that the last day to serve discovery requests was December 15, 2004. Weitzman also demanded a new liability hearing "to resubmit all [Vermont's] evidence," or the resignation of the arbitrator.

On February 9, 2005, Weitzman sent another facsimile indicating that he and cocounsel were "not available" for an evidentiary hearing on February 14. The arbitrator cancelled the evidentiary hearing, but informed the parties in writing that the arbitration hearing would proceed as scheduled on February 16. Neither of Vermont's attorneys appeared at the hearing on February 16, and the matter proceeded as a default on the issue of damages.

The arbitrator issued an 11-page award relating to damages. As in the liability phase, the arbitrator gave a detailed legal and factual analysis. The arbitrator noted that Vermont's case was hamstrung by its attorneys' failure to appear at the hearing and present any evidence of Vermont's damages. The arbitrator also observed that Attorney

Weitzman made intentionally false statements in the brief he submitted. Vermont was awarded $1,527.36 for losses stemming from Molina's breach of contract.

On February 22, 2005, the arbitrator denied Vermont's motion for reconsideration. Among other things, he noted that Attorney Weitzman had not appeared at any hearing in the matter, including the hearing on his client's motion for reconsideration. The arbitrator also observed that Weitzman and Cocounsel David Brand did not demonstrate good cause to continue the February 16 hearing.

Molina petitioned the trial court to confirm the arbitration award. Vermont opposed the motion to confirm, and asked that the award be vacated. Vermont argued that the arbitrator was unable to resolve the dispute because of his "impaired memory"; his failure to consider evidence Vermont introduced during the liability phase; his refusal to grant a continuance; and because the award was procured by corruption, fraud, or other undue means. Vermont attributed its claim of corruption and undue means to Molina's "size" as a publicly held company that makes political contributions, whereas Vermont "is a small ghetto medical clinic." "The money and the power, Molina's willingness to break the law if necessary to maintain the high profits is what bends the arbitrators [*sic*] will," Vermont argued. Vermont cited the arbitrator's annoyance with Attorney Weitzman as "an indication of corruption." Finally, Vermont contended that it was denied the opportunity to be heard because the arbitrator did not continue the February 16 hearing date. In a vaguely worded declaration, Weitzman stated (without explanation) that he was "unavailable" on February 16, while Cocounsel Brand "would be in trial." There was no declaration from Brand regarding his availability on February 16; however, during the hearing on the motion to confirm, Brand informed the trial court that on February 16, he "met with opposing counsel in [a trailing] case to go over jury instructions . . . ." The trial in Brand's trailing case did not begin until the end of February.

The trial court granted Molina's motion to confirm the arbitration award. It entered judgment on the award on June 21, 2005. This timely appeal from the judgment ensued.

DISCUSSION

An appeal may properly be taken from a judgment entered upon an arbitration award. (Code Civ. Proc., § 1294, subd. (d).)[2] Intermediate rulings that affect the judgment or which substantially affect the rights of a party are encompassed within the scope of the appeal. (§ 1294.2.) An order denying a request to vacate an award is an intermediate ruling reviewable on appeal from the judgment. (*Mid-Wilshire Associates v. O'Leary* (1992) 7 Cal.App.4th 1450, 1454.)

We review the trial court's refusal to vacate an award under a de novo standard, though to the extent that the trial court determined disputed factual issues, we apply a substantial evidence test. (*Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55-56; *Schlessinger v. Rosenfeld, Meyer & Susman* (1995) 40 Cal.App.4th 1096, 1103, fn. 10.)

Parties "to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) The merits of the award are not subject to judicial review. (*Id.* at p. 11.) This means we ignore the arbitrator's reasoning and the sufficiency of the evidence supporting the award. (*Ibid.*) Upon a party's petition, the trial court must confirm the arbitration award unless it finds a reason to correct or vacate the award, or dismiss the proceeding. (§§ 1285, 1286.) There are but a few, specified grounds upon which the courts may vacate an award, which involve "serious problems with the award itself, or with the fairness of the arbitration process." (*Moncharsh, supra,* 3 Cal.4th at p. 12.)

The specified grounds for judicial review are: "(1) The award was procured by corruption, fraud or other undue means. (2) There was corruption in any of the arbitrators. (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. (4) The arbitrators exceeded their powers . . . . (5) The rights of the

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[2] All further statutory references are to the Code of Civil Procedure.

party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. . . ." (§ 1286.2, subd. (a).) Within the framework of section 1286.2, we examine each of Vermont's complaints about the arbitrator.

Arbitrator's Health

Without any evidence to support its claim, Vermont contends that the arbitrator had a "failing memory" that impaired his ability to function. Vermont points to the arbitrator's age and treatment for prostate cancer as proof of the arbitrator's purported lack of memory.

Vermont's claims of memory impairment are pure speculation, unsupported by any admissible medical evidence. The very notion of disability on the part of the arbitrator is resoundingly contradicted by the two-part, 25-page liability and damages award, which contains an impressively detailed factual and legal analysis. The soundness of the award belies any suggestion regarding the unsoundness of the arbitrator. There was no memory failure on the part of the arbitrator, only a failure on the part of Attorneys Weitzman and Brand to appear at the damages hearing and present any evidence on behalf of their client.

Arbitrator Misconduct

Vermont asserts that the arbitrator engaged in misconduct by refusing to continue the hearing date for the damages phase of the proceeding; by going forward with a hearing on Vermont's motion for reconsideration without waiting for a tardy court reporter to arrive; by lacking facility in his note-taking abilities; by refusing to allow a witness to read the arbitrator's personal notes regarding the witness's testimony; by allowing into evidence a photocopy of a check after the original was destroyed; by denying a discovery request; and by rejecting Vermont's brief on prejudgment interest.

Vermont forfeited its right to make all but one of its claims of misconduct by failing to assert them in the trial court. A reviewing court does not consider a challenge to a ruling when the party making the challenge failed "to bring errors to the attention of

the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) A party cannot successfully complain on appeal that the trial court erred when the purported error was not something the trial court was asked to rule on. (*Farmers Bros. Co. v. Franchise Tax Bd.* (2003) 108 Cal.App.4th 976, 993.)

The only claim of misconduct that Vermont preserved for review is the arbitrator's refusal to grant a continuance.[3] The arbitrator may refuse to grant a continuance in the absence of "sufficient cause being shown" by the party requesting the continuance. (§ 1286.2, subd. (a)(5).)

In this case, the arbitrator and the parties mutually agreed, in October 2004, to a February 16 arbitration hearing date. The date was reconfirmed multiple times. On February 3, 2005, 13 days before the hearing, Attorney Weitzman asked for a continuance in order to conduct further discovery. The discovery cut-off date agreed upon by the parties was December 15, 2004. Vermont's request to conduct additional discovery was readily ignored, inasmuch as the arbitration had been pending since 2001, and there was plenty of time--years, in fact--to complete discovery. When an arbitration proceeding has been pending for two years or more, the parties have had ample time to procure evidence and the arbitrator need not grant a continuance to allow further discovery. (*Shammas v. National Telefilm Associates* (1970) 11 Cal.App.3d 1050, 1055.)

In a February 15 facsimile, one day before the hearing, Weitzman for the first time suggested to the arbitrator that he and Brand were not available on February 16 and would not be available until the arbitrator granted Vermont a new liability hearing and additional discovery. The arbitrator properly ignored this last-minute threat, which was obviously a tactical maneuver to force the arbitrator to give in to Vermont's unwarranted

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[3] We address the discovery issue below, as Vermont makes a separate argument relating to it.

demands.[4] The February 15 facsimile provides no cogent reason why Weitzman and Brand could not attend the February 16 hearing.

In any event, Attorney Brand was not in trial on February 16, the day of the arbitration hearing: Brand admits that he was discussing proposed jury instructions in a trailing case with opposing counsel that day, and that the trial did not begin until the end of February. There is no reason why Brand could not have appeared for the arbitration hearing. Any suggestion that Weitzman was "booked up" for the month of February is unavailing. In October 2004, Weitzman agreed to appear for the hearing on February 16. He had four months to arrange his schedule around the hearing date. Merely saying he was "not available"--without explaining why--does not constitute a sufficient reason for a continuance. In sum, Vermont did not demonstrate good cause for continuing the arbitration hearing date, and the arbitrator properly denied the request. Once the request for a postponement was denied, the arbitrator was entitled, under the applicable AAA arbitration rules, to proceed in the absence of Vermont and its attorneys.

Exclusion of Evidence

Vermont contends that the arbitrator improperly prevented it from obtaining discoverable material by issuing a protective order. Vermont sought to discover "information on a penalty imposed by the Federal Government for [Molina's] misconduct regarding transfer of patients between providers without the patients [*sic*] nor the provider's permission or knowledge, and lying to the patients." The arbitrator also denied Vermont's request to obtain "prior and subsequent" versions of an exhibit to the parties' service agreement, which specifies the capitation compensation rates applicable to their agreement.

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[4] With the benefit of hindsight, it was a tactical blunder, because the arbitrator refused to cave and Vermont ended up being abandoned by its attorneys at the February 16 damages hearing.

"[A] challenge to an arbitrator's evidentiary rulings or limitations on discovery should not provide a basis for vacating an award unless the error *substantially prejudiced* a party's ability to present *material* evidence in support of its case." (*Schlessinger v. Rosenfeld, Meyer & Susman*, *supra*, 40 Cal.App.4th at p. 1110.) A court can only intercede if the arbitrator "*has prevented a party from fairly presenting its case*" such that "the arbitrator might well have made a different award had the evidence been allowed." (*Id*. at p. 1111.)

The excluded evidence cited by Vermont would not have changed the outcome of the arbitration. There is no showing that the penalty imposed by the federal government has anything to do with the breach of the parties' service contract. It is not relevant to this dispute. Likewise, capitation rates "prior and subsequent" to the service agreement between these particular parties is not germane. What mattered were the capitation rates that were part of this specific contract between these particular parties, not rates that Molina negotiated with anyone else.

Arbitrator Bias

Bias on the part of the arbitrator is a reason to vacate an award. "To support a claim of bias, a party must demonstrate the arbitrator had an interest in the subject mater of the arbitration or a preexisting business or social relationship with one of the parties which would color the arbitrator's judgment." (*Luster v. Collins* (1993) 15 Cal.App.4th 1338, 1345.)

Vermont points to no evidence of a preexisting business or social relationship between the arbitrator and a party. Instead, it claims that the arbitrator was biased because he questioned Attorney Weitzman's truthfulness. The arbitrator's expressions of annoyance with Weitzman are not grounds for vacating the award.

Miscarriage of Justice

Vermont maintains that it is unfair that Molina cancelled the parties' service agreement and kept Vermont's patients. This was the essence of the parties' dispute, which was resolved in arbitration. We have no authority to review the merits of the resolution reached by the arbitrator. (*Moncharsh, supra,* 3 Cal.4th at p. 11.)

Undue Influence

Vermont saves its most egregious argument for last. It suggests that Molina engages in bribery and "has a poor ethical reputation," though no one has been arrested or criminally charged. From this shaky foundation, Vermont goes on to hypothesize that the arbitrator faces big expenses from his cancer treatment and "probably is vulnerable to manipulation." It speculates that "It is not beyond the realm of possibilities that [Molina] had been able to reach Arbitrator J. Fields, in some way."

We reject this unsupported accusation of bribery and corruption. Attorney Weitzman is abusing the protective environment of litigation to engage in character assassination. His attacks on Fields are all of a piece with his earlier attack on the arbitrator appointed by the AAA, whom he accused of bias as soon as some preliminary discovery rulings looked unfavorable, and his attack on the impartiality of the AAA. This behavior cannot be condoned, and we look askance at the ethics of any lawyer who makes unfounded claims of bribery just to win an advantage for his client.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J. CHAVEZ, J.